Supreme Court, U.S.
FILED

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No. 98-___

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MICHAEL BOWERSOX,
Superintendent, Potosi Correctional Center,

Petitioner,

vs.

KEITH A. SMITH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

WHETHER 28 U.S.C. §2244(d)(1)(A), REQUIRING A PETITION FOR WRIT OF HABEAS CORPUS TO BE FILED WITHIN ONE YEAR OF COMPLETING "DIRECT REVIEW", INCLUDES WITHIN THE DEFINITION OF "DIRECT REVIEW" DISCRETIONARY ACTS SUCH AS A PETITION FOR WRIT OF CERTIORARI?

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The October 20, 1998, panel opinion of the United States Court of Appeals is reported at 159 F.3d 345 (8th Cir. 1998) and is included in the Appendix at A-1. The District Court's order is not reported, but is included in the Appendix at A-11.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on October 20, 1998. Under Supreme Court Rule 13.1 the petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

28 U.S.C. §2244(d)(1)(A) provides, in relevant part, that:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

STATEMENT OF THE CASE

Respondent was convicted on two counts of murder in the first degree. Respondent was sentenced to life imprisonment without the possibility of probation or parole for the murder of Reverend Parris Campbell. Respondent was sentenced to death for the murder of Annie Miller. The evidence adduced at trial established that respondent was a periodic guest at the home of Reverend Campbell. Between the hours of eight and nine o'clock on the evening of November 17, 1991, Miller -- Reverend Campbell's housekeeper -- was in the kitchen preparing dinner for Reverend Campbell and respondent. Reverend Campbell went downstairs to the family room to talk to respondent. At some point during this conversation, respondent attacked Reverend Campbell by choking him with his arm. Respondent eventually obtained an electrical cord and, by wrapping the cord around Reverend Campbell's neck, continued choking Reverend Campbell. Respondent then went upstairs to the kitchen where he obtained a knife, returned downstairs, and stabbed Reverend Campbell.

At some point during the attack, Alphonso Smith, respondent's fifteen-year-old cousin, came to the back door where he was let in by respondent. Respondent instructed Smith to make sure Reverend Campbell was dead while he went upstairs to the kitchen. There he told Miller that Reverend Campbell needed her downstairs. Miller began down the stairs with respondent following. Respondent grabbed Miller by the neck and began to choke her. Respondent then wrapped an electrical cord around Miller's neck and continued to choke her until she fell to the floor. Respondent returned upstairs where he obtained a pair of scissors.

Respondent returned downstairs and stabbed Miller with the scissors.

Respondent then dragged the bodies into the garage where Reverend Campbell kept two cars. Respondent put both bodies into the trunk of one car. Respondent placed his belongings, along with Reverend Campbell's checkbook, credit cards, cash, gold jewelry, gun, and stereo speakers, in the other car. Respondent and Smith fled using this car, stopping to pick up respondent's girlfriend Sylvia Ware. Respondent told Ware the details of the killings.

On November 23, 1991, the police discovered the bodies of Reverend Campbell and Miller in the trunk of the car parked in Reverend Campbell's garage. Three pieces of electrical cord were also found in the trunk, including one still wrapped around Miller's neck. Respondent was arrested the next day, and confessed to the murders.

Respondent's conviction and sentence and the denial of his post-conviction relief motion, were affirmed by the Missouri Supreme Court on April 29, 1997 in ***State v. Smith***, 944 S.W.2d 901 (Mo. banc), ***cert. denied***, ___ U.S. ___, 118 S.Ct. 377, 139 L.Ed.2d 294 (1997). Certiorari was denied by this Court on November 3, 1997.

On November 13, 1997, respondent filed a motion for appointment of counsel. Counsel was appointed on December 8, 1997. Appointed counsel sought a scheduling order on March 23, 1998. In this request for a scheduling order, respondent requested until November 3, 1998, in which to file a petition for writ of habeas corpus under 28 U.S.C. §2254. On April 17,

1998, the district court denied petitioner's opposition to respondent's request to have until November 3, 1998 in which to file his petition and entered an order granting respondent until November 2, 1998 in which to file his petition.

Petitioner moved the District Court to reconsider its order. While the District Court denied petitioner's motion, the District Court did grant petitioner's motion for leave to file an interlocutory appeal. 28 U.S.C. §1292(b). On May 22, 1998, the Eighth Circuit Court of Appeals granted petitioner leave for interlocutory appeal. The Court of Appeals upheld the district court's order in an opinion dated October 20, 1998. (App. at 1). ***See Smith v. Bowersox***, 159 F.3d 345 (8th Cir. 1998).

REASONS FOR GRANTING THE WRIT

This case involves an important question of federal law that has not been, but should be, settled by this Court because it involves the statutory interpretation of 28 U.S.C. §2244(d)(1)(A), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (Hereinafter "AEDPA"). The Court of Appeals' holding in the interlocutory appeal that the term "direct review" includes the opportunity to file a discretionary action, such as a petition for writ of certiorari to this Court after a direct appeal in state court, is contrary to the Congressional intent underlying the AEDPA as will be established by comparing the provisions of the AEDPA.[1]

This issue is one of great significance that requires immediate legal certainty because the lower court's opinion induces inmates into believing that a petition for writ of certiorari is part of the "direct review". The need for heightened certainty benefits both

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[1]This Court has previously granted review of interlocutory appeals in ***Fortnightly Corp. v. United Artists Television***, 392 U.S. 390, 393 (1968) and ***Hawaii v. Standard Oil Company of California***, 405 U.S. 251, 256 (1972). Resolution of this issue is dispositive of the case below. ***See Myers v. Bethlehem Shipbuilding Corporation, Limited***, 303 U.S. 41, 52 (1938)(presenting a jurisdictional issue); ***American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.***, 148 U.S. 372, 387 (1893)(presenting novel and important issues). This Court should not postpone "resolution of this basic issue" -- whether the district court has jurisdiction to entertain the petition. ***See Mills v. Electric Auto-Lite Co.***, 396 U.S. 375, 381 (1970).

States and inmates relying on the time limits of §2244(d)(1)(A). A great number of pending cases will turn on the resolution of this issue since the deadline for filing a petition for writ of habeas corpus is determined by when direct review is concluded. This causes a serious practical problem because inmates who rely on the lower court's interpretation that direct review includes the opportunity to file a discretionary action, such as a petition for writ of certiorari, may later find that their petitions are untimely. This question presents not only a general issue of importance since it applies to all inmates within the jurisdiction of the Eighth Circuit Court of Appeals, but also an issue of national importance since §2244(d)(1)(A) applies to all inmates challenging their state court convictions. ***Supreme Court Rule 10(c)***.

The Court of Appeals held that "direct review" included the opportunity to seek certiorari because "there is a well-established body of federal case law that interprets the phrase 'final by the conclusion of direct review' to include an opportunity to seek certiorari." (App. at 5)(footnote omitted). In support of this position, the Court of Appeals relied on this Court's holdings in ***Teague v. Lane***, 489 U.S. 289 (1989) and ***Caspari v. Bohlen***, 510 U.S. 383 (1994). Rather than conducting a statutory interpretation of §2244(d)(1)(A), the Court of Appeals simply concluded that this Court's decisions discussing finality for the purpose of retroactivity applied to §2244(d)(1)(A).

The limitations period, found in 28 U.S.C. §2244(d)(1), states, in pertinent part, that:

> A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; . . . .

The Court of Appeals held that when Congress elects to use terminology that has become common place in court decisions, statutory construction calls for the courts to define the statutory terms in harmony with the accepted judicial meaning. The use of prior terminology relating to the finality of a conviction to a newly created statute of limitations is error for several reasons.

First, in determining that statutory construction calls for the court to define terms in harmony with accepted judicial meaning, the Court of Appeals relied on this Court's holding in ***Evans v. United States***, 504 U.S. 255, 259-60 (1992) (App. at 5). However, in ***Evans*** this Court looked at Congress' intent: "[b]ecause the majority view is consistent with the common-law definition of extortion, *which we believe Congress intended to adopt*, we endorse that position." ***Id***. at 259 (emphasis added).

In determining whether Congress intended §2244(d)(1)(A) to include an opportunity to file a petition for writ of certiorari as part of "direct review", one must review the AEDPA. ***Cf. Lindh v. Murphy***, 521 U.S. 320, ___, 117 S.Ct. 2059, 2063, 138 L.Ed.2d 481 (1997)(comparing §2254 with §2263). This Court in ***Lindh***, compared the language in various portions of the AEDPA to determine that §2254 did not apply to petitions filed before the AEDPA was signed into law. ***Id.***; ***see also Hohn v. United States***, ___U.S. ___, ___, 118 S.Ct. 1969, 1976, 141 L.Ed.2d 242 (1998)(comparing 28 U.S.C. §1254(1) and §2244(b)(3)). Had the Court of Appeals compared the various portions of the AEDPA it would have discovered that Congress did not intend the term "direct review" to include a petition for writ of certiorari to this Court after a direct appeal in state court.[2]

Comparing §2244(d)(1)(A), which applies to non-capital inmates, and to 28 U.S.C. §2263(b), which applies to capital inmates, demonstrates that Congress did not intend the term "direct review" to include discretionary actions – such as a petition for writ of

---

[2]While non-capital inmates would have one year after the disposition of certiorari in which to file their petitions under the Court of Appeals opinion, the time between the state court's decision and the filing of certiorari does not toll the time limits for inmates under capital sentence. ***See*** 28 U.S.C. §2263(b). Thus, the lower court has given non-capital inmates far more time in which to file a petition for writ of habeas corpus than capital inmates. If Congress intended to remove delays in the filing of petitions, it surely did not mean to shorten the filing period only in capital proceedings.

certiorari. In §2263(b) the statute of limitations is tolled from:

> . . . the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on *direct review by the court of last resort of the State* or other final State court decision on *direct review*. (emphasis added)

Since a properly filed petition for writ of certiorari *after* "direct review" tolls the time limits in §2263(b), which applies to capital inmates, it is clear that Congress used the term "direct review" under §2244(d)(1)(A) to refer to the conclusion of proceedings in state court. Had Congress wanted a petition for writ of certiorari to toll the time limits of §2244(d)(1)(A), Congress could have explicitly so stated as it did in §2263(b). ***See Lindh***, 521 U.S. at ___, 117 S.Ct. at 2063.

Furthermore, the purpose of the statute of limitations in §2244(d)(1)(A), and this Court's doctrine of retroactivity in ***Teague***, serve different purposes. The AEDPA modified §2244 by requiring a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 to be filed within one year after conclusion of direct review in order to facilitate prompt filing of petitions. On the other hand, the purpose of this Court's retroactivity doctrine in ***Teague*** was to avoid vacating criminal convictions based on a law that was not dictated by this Court when the defendant's conviction became final. Finality for this purpose, as indicated by this Court in ***Teague***, includes certiorari.

Because the rationale between the two are dissimilar, there is no purpose to import this Court's decisions determining when a case is final for retroactivity to determining when direct review is concluded for the purpose of §2244(d)(1)(A). This is especially true given that the doctrine of retroactivity was developed long before the enactment of the AEDPA. Had Congress intended direct review to include the filing of a petition for certiorari, Congress could have done so just as it did in §2263(b). The absence of this language is an indicator that the time in which to seek certiorari is not included in the one year statute of limitations. ***Cf. Lindh***, 521 U.S. at ___, 117 S.Ct. at 2065.

This is also established by the fact that this Court in ***Fay v. Noia***, 372 U.S. 391, 435 (1963), noted that a petition for writ of certiorari is not necessary for a prisoner to exhaust his state court remedies. Certiorari is discretionary, and a state prisoner has no right to certiorari review. ***Id.*** at 436. In fact, certiorari is not part of a prisoner's first appeal of right, and the decision to grant certiorari is purely discretionary. ***Supreme Court Rule 10.*** This Court eliminated the requirement to file a petition for writ of certiorari as an exhaustion requirement because it did not ensure accurate state court resolution of constitutional claims, and because of unnecessary delay in federal review of state convictions, caused by requiring certiorari. This unnecessary delay is consistent with Congress' intent in enacting the AEDPA. Congress can not have intended for certiorari to be part of the "direct review" if the intent of the AEDPA was to cut down on delays. As this Court suggested in ***Fay***, the two approaches are mutually exclusive.

Since a petition for writ of certiorari is not necessary for exhaustion, and is not relevant for default analysis, there is no policy reason to include the filing of a petition for writ of certiorari in the one year statute of limitations. Given the discretionary nature of post-opinion litigation, and the collateral nature of such litigation, such motions are beyond "the conclusion of direct review." ***28 U.S.C. §2244(d)(1)(A).***[3] The conclusion by the Court of Appeals creates an incentive for all inmates, both capital and non-capital, to file for certiorari in order to stop the clock under §2244(d)(1)(A) regardless of the merit of seeking such review.

In summary, the plain language of §2244(d)(1)(A) does not support the position that "direct review" includes the opportunity to file certiorari. This is especially true since §2263(b) states that a properly filed petition for writ of certiorari *after* "direct review" tolls the time in which a petition for writ of habeas corpus must be filed and where the rationale of finality for retroactivity and direct review for filing a petition for writ of habeas corpus are dissimilar.

Given the recurring nature of this serious practical problem created by the decision, along with both the general and national importance of this issue, certiorari should be granted to determine the definition of "direct review" under §2244(d)(1)(A).

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[3]As a matter of Missouri law, a judgment becomes final when a mandate is issued. ***Meierer v. Meierer***, 876 S.W.2d 36, 37 (Mo. App. 1994).

CONCLUSION

Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and reverse the judgment of that court.

Respectfully submitted,

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BEST AVAILABLE COPY

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-2358

Keith A. Smith,	*	
	*	
Appellee,	*	
	*	
v.	*	Appeal from the United States District Court for the Western District of Missouri
	*	
Michael Bowersox,	*	
	*	
Appellant.	*	
	*	

Submitted Sept. 22, 1998.
Filed Oct. 20, 1998.

Before HANSEN, BRIGHT, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

BRIGHT, Circuit Judge.

Appellant, Michael S. Bowersox, is the warden of the Missouri State Penitentiary. He takes this interlocutory appeal from a district court[1] scheduling

[1]The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri.

order, an order which determined the limitations period under 28 U.S. §2244(d)(1)(A) and gave the petitioner, inmate Keith A. Smith, until November 2, 1998--one year after the Supreme Court rejected his petition for writ of certiorari--to file an application for writ of habeas corpus. Because the statute of limitations was properly interpreted, we now affirm.

I.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) changed the federal law of habeas corpus. Among other alternations, the AEDPA imposed a one-year statute of limitations on petitioners for writ of habeas corpus filed under 28 U.S.C. §2254. This limitations period, found at 28 U.S.C. §2244(d)(1), states in pertinent part that:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; . . . .

Although both parties to this appeal recognize the applicability of the statute, they differ in their interpretation of how the time bar should be calculated. Appellant argues that the phrase "became final by the

conclusion of direct review" refers to the conclusion of state court review only and excludes the prospect of certiorari. Appellee, in contrast, maintains that the opportunity for Supreme Court review falls within the meaning of the phrase.

II.

Petitioner Smith is incarcerated by the State of Missouri, under sentence of death, for a 1991 double murder. The Supreme Court of Missouri affirmed his conviction, sentence, and the denial of any post-conviction relief, State v. Smith, 944 S.W.2d 901, 909 (Mo.1997)(en banc), and refused his request for rehearing on May 27, 1997. The United States Supreme Court denied his petition for writ of certiorari on November 3, 1997. Smith v. Missouri, 118 S.Ct. 377 (1997).

Anticipating the need to file an application for federal habeas relief, Smith moved the federal district court for appointment of counsel. That motion was granted, and, subsequently, on March 23, 1998, Smith filed a motion for the entry of a scheduling order requesting that the district court determine the time frame within which he would be permitted to file his habeas petition. As we have observed, Smith urged the court, inter alia, to find that the one-year limitations period should run from the date on which the United States Supreme Court denied his petition for certiorari. In contrast, Bowersox argued that the statute of limitations began to run much earlier--on the date that he Missouri Supreme Court issued its mandate.

The district court entered its order on April 17, 1998. It ruled that, for purposes of the AEDPA, the judgment against Smith became final when his petition for a writ of certiorari was denied, and, as a result, that any application for federal habeas corpus relief in this case must be filed on or before November 2, 1998.

In response to Bowersox's motion so to do, the district court granted leave for an interlocutory appeal to this court pursuant to 28 U.S.C. §1292(b).[2]

III.

The terms of the AEDPA do not address the meaning of the phrase "conclusion of direct review." Warden Bowersox argues that the common understanding of "direct review", as well as the case law

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[2]Both parties to this action, as well as the district court, agree that we have jurisdiction to hear this case. Although the Court's recent decision in Calderon v. Ashmus, 118 S.Ct. 1694 (1998), held that the determination for certain limitation provisions of the AEDPA was not justiciable, we find Ashmus to be distinguishable from the case at bar because the procedural postures of the two cases are significantly different. While the petitioner in Ashmus sought an interpretation concerning which statute of limitations would govern his hypothetical habeas petition through a declaratory judgment action, the issue is raised in this case as part of a valid scheduling order issued in an active controversy, one over which the district court has properly taken cognizance.

interpreting other aspects of the statute[3], indicates that the limitations period is launched merely by the conclusion of state court review.

We reject this view.

Review of a state criminal conviction by the Supreme Court of the United States is considered direct review of the conviction. Bell v. Maryland, 378 U.S. 226, 232 (1964). Moreover, there is a well-established body of federal case law that interprets the phrase "final by the conclusion of direct review" to include an opportunity to seek certiorari.[4] When Congress elects to use terminology that has become commonplace in court decisions in a particular field of law, the rules of statutory construction call for us to define the statue's terms in harmony with that accepted judicial meaning. See, e.g., Evans v. United States, 504 U.S. 255, 259-60 (1992) (citing and quoting Morissette v. United States, 342 U.S. 246, 263 (1952)). Thus, a chance to solicit review of constitutional issues before the United States Supreme Court, after the end of state court proceedings, properly falls within the meaning of "final by the conclusion of direct review."

We conclude that the running of the statute of limitations imposed by §2244(d)(1)(A) is triggered by either (i) the conclusions of all direct criminal appeals in

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[3]See, Lindh v. Murphy, 117 S.Ct. 2059 (1997)(interpreting sections of the AEDPA not in question here).

[4]See, e.g., Teague v. Lane, 489 U.S. 289, 295 (1989) and Caspari v. Bohlen, 510 U.S. 383, 390 (1994).

the state system, followed by either the completion or denial of certiorari proceedings before the United States Supreme Court; or (ii) if certiorari was not sought, then by the conclusion of all direct criminal appeals in the state system followed by the expiration of the time allotted for filing a petition for the writ.

Smith sought certiorari promptly and properly following the Missouri court's determination for his appeal. When the Supreme Court denied his plea of writ of certiorari on November 3, 1997, the one-year statute of limitations began to run. In this case, Smith has until midnight, November 2, 1998 to petition for habeas corpus in the federal courts.

Accordingly, we affirm the order of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-8083

Keith A. Smith, *

*

Respondent, *

*

v. *

*

Michael Bowersox, *

*

Petitioner. *

Filed: May 22, 1998

Before BOWMAN, Chief Judge, BRIGHT and BEAM, Circuit Judges.

ORDER

The petition for permission to file an interlocutory appeal is granted.

The appeal presents important and complex issues. Although the petition for leave to file an interlocutory appeal was filed in St. Louis on May 7, 1998, it did not come to the attention of the panel until

today, May 21, 1998. The state's position is that Smith's habeas petition must be filed by May 27, 1998. (In fact, if the state's position is correct, Smith must file his habeas petition by May 26, 1998.) The district court adopted Smith's position, which is that he has until November 2, 1998 to file his habeas petition. Given the short time frame and the absence of adequate briefing and opportunity for oral argument, the Court will not attempt to decide the appeal by May 26, 1998.

The appeal nevertheless will be handled on an expedited basis. The Clerk of the Court is directed to establish an expedited briefing schedule.

If the appeal results in a decision favoring the state's position regarding the filing deadline for Smith's habeas petition, Smith will be granted leave to file his petition nunc pro tunc, with the same legal effect and force as if filed on May 26, 1998.

It is so ordered.

A true copy.

Attest: -- signature--

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KEITH A. SMITH,	)	
	)	
Petitioner,	)	
	)	Case No.
v.	)	97-MC-9058-5-3-4
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

ORDER

Petitioner is an inmate on Missouri's death row. The parties agree that petitioner must file his application for habeas corpus relief within one year of "the date on which the judgment became final by the conclusion for direct review or the expiration of the time for seeking such review." 28 U.S.C. §2244(d)(1)(A).[1] Petitioner contends that the judgment against him became final on November 3, 1997, when the United States Supreme Court denied his petition for a writ of certiorari. Respondent contends that the judgment became final on May 27, 1997, when the Missouri Supreme Court issued its mandate.

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[1]Respondent does not seek to invoke the special (opt-in) procedures contained in 28 U.S.C. §§2261-66. Doc. No. 8, p. 1 n.1.

On April 17, 1998, the court accepted petitioner's contention and found that his deadline for filing a habeas corpus application is November 2, 1998.

On April 24, 1998, respondent filed a motion for reconsideration or, in the alternative, a motion for leave to take an interlocutory appeal. On May 5, 1998, the court denied those motions. Later on May 5, 1998, in a telephone conference, both parties urged the court to certify for interlocutory appeal the question of petitioner's filing deadline.

The court now agrees that the order of April 17, 1998, which establishes November 2, 1998, as petitioner's deadline for filing an application for habeas corpus relief, "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation . . . . " 28 U.S.C. §1292(b).

Accordingly, it is **ORDERED** that respondent's motion for leave to take an interlocutory appeal (Doc. No. 11) is granted, and the portion of the previous order to the contrary (Doc. No. 12) is vacated.

--Signature--
GARY A. FENNER
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,

Dated: 5-6-98.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KEITH A. SMITH,	)	
	)	
Petitioner,	)	
	)	Case No.
vs.	)	97-MC-9058-5-3-4
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

ORDER

Petitioner is an inmate on Missouri's death row. On November 13, 1997, in anticipation of filing an application for federal habeas corpus relief, petitioner moved for the appointment of counsel. On December 8, 1997, the court granted petitioner's motion.

On March 23, 1998, counsel for petitioner filed a pleading entitled "Motion for Entry of Scheduling Order or, in the Alternative, for Extension for Time to Plead and Suggestions in Support."[1] Petitioner asks the

---

[1]The court finds that a ruling on the merits of petitioner's motion will not constitute an advisory opinion. See Moseley v. French, 961 F.Supp. 889, 894 (M.D.N.C. 1997) (condemned state prisoner ordered to file habeas corpus application within 60 days). But see In re Watson, No. C 97-2681 SI (PR), 1997 WL 487431 (N.D. Cal. Aug. 6, 1997) (in a noncapital case, court

court to find that "the filing of his motion for appointment of counsel 'commences' this habeas corpus proceeding for purposes of the limitations periods imposed by the Antiterrorism and Effective Death Penalty Act of 1996[(AEDPA)]." Doc. No. 7, p. 1. Petitioner relies on McFarland v. Scott, 512 U.S. 849, 859 (1994), in which the Court held that a prisoner under sentence of death may invoke his statutory right to appointed counsel before actually filing an application for federal habeas corpus relief.

Respondent argues that "McFarland was a pre-AEDPA case and merely discussed when a federal court ha[s] jurisdiction of a case in order to issue a stay of execution." Doc. No. 8, p. 2 (opposing suggestions). Other courts have accepted respondent's argument. See Calderon v. United States Dist. Court, 128 F.3d 1283, 1287 n. 3 (9th cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 899 (1998); Holman v. Gilmore, 126 F.3d 876, 879-80 (7th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1169 (1998); Williams v. Cain, 125 F.3d 269, 273-74 (5th Cir. 1997); Moseley v. French, 961 F.Supp. 889, 892-93 (M.D.N.C. 1997).

As in Holman, the court finds that "[a] §2254 case is commenced on the date the petition is filed." 126 F.3d at 880. The court agrees that "McFarland suggests [no] alteration of the usual rule that a case is commenced by filing a petition seeking substantive relief." Id.

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refused to determine in advance whether habeas corpus application would be time-barred).

Alternatively, petitioner asks the court to determine the date by which he must file his habeas corpus application. The parties agree that the application must be filed within one year of "the date on which the judgment became final by the conclusion for direct review or the expiration for the time for seeking such review." 28 U.S.C. §2244(d)(1)(A).[2] Petitioner argues that the judgment against him became final on November 3, 1997, when the United States Supreme Court denied his petition for a writ of certiorari. Respondent argues that the judgment became final on May 27, 1997, when the Missouri Supreme Court issued its mandate.

At least one court and three scholars favor petitioner's argument. See Alexander v. Keane, ___ F.Supp. ___, No. 97 Civ. 2526(SS), 1998 WL 17737, at *4 n.2 (S.D.N.Y. Jan. 14, 1998) ("the Court rejects respondent's argument that the statute of limitations [in §2244(d)(1)(A) should be calculated] without adding the ninety days in which a petition for certiorari could have been filed") (citing Caspari v. Bohlen, 510 U.S. 383, 390 (1994)); James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure §5.1b n. 28 (2d ed. Supp. 1997); Larry W. Yackle, A primer on the New Habeas Corpus Statute, 44 Buff. L. Rev. 381, 387 n.18 (1996).

Based on the authority cited above, and for the purpose of determining the period of limitation under §2244(d)(1)(A), the court finds that the judgment against

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[2]Respondent does not seek to invoke the special (opt-in) procedures contained in 28 U.S.C. §§2261-66. Doc. No. 8, p. 1 n.1.

petitioner became final on November 3, 1997, when the United States Supreme Court denied his petition for a writ of certiorari. Because the court so finds, and because "sufficient time remains to file a petition," the remaining points in petitioner's motion (equitable tolling, etc.) need not be addressed. Moseley, 961 F.Supp. at 893.

Accordingly, it is **ORDERED** that petitioner's "Motion for Entry of Scheduling Order or, in the Alternative, for Extension of Time to Plead and Suggestions in Support" (Doc. No. 7) is granted as follows: Petitioner must file any application for federal habeas corpus relief on or before November 2, 1998.

--Signature--
GARY A. FENNER
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,

Dated: 4-17-98 .

ORIGINAL

Supreme Court, U.S.
FILED
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No. 98-1127

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MICHAEL BOWERSOX,
Superintendent, Potosi Correctional Center,

Petitioner,

v.

KEITH A. SMITH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the phrase "conclusion of direct review," as used in 28 U.S.C. § 2244(d)(1)(A), means that the one-year period for filing a petition for writ of habeas corpus commences to run upon conclusion of certiorari review by this Court or when the time for seeking such review expires?

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STATEMENT OF THE CASE

Keith Smith is an inmate on Missouri's death row. Smith was convicted of a capital offense and sentenced to death. He appealed his conviction and sentence and the denial of post-conviction relief to the Supreme Court of Missouri, which affirmed the conviction. *State v. Smith*, 944 S.W.2d 901, 909 (Mo. banc), *cert. denied*, 118 S.Ct. 377 (1997).

Smith then filed his petition for writ of certiorari. On November 3, 1997, this Court denied Smith's petition. In anticipation of filing an application for federal habeas corpus relief, Smith initiated litigation in federal district court by filing a motion for appointment of counsel on November 13, 1997. The district court appointed present counsel on December 8, 1997.

On March 23, 1998, Smith filed a motion for entry of scheduling order requesting leave to file his petition for writ of habeas corpus under 28 U.S.C. § 2254 on or before November 3, 1998. The district court rejected respondent Bowersox' argument that the one-year limitations period under 28 U.S.C. § 2244(d)(1)(A) should begin to run from the date of the decision of the state's court of last resort. Instead, the district court found that the phrase "conclusion of direct review" found in Section 2244(d)(1)(A) has clearly and historically meant direct review of state court decisions by this Court through a petition for writ of certiorari. Pet. App. A13-14.

Accordingly, the district court entered its order finding November 2, 1998 to be the filing deadline for Smith's habeas corpus petition. Pet. App. A14. Respondent Bowersox moved for reconsideration and the district court denied that motion. On May 6, 1998, the district court granted Bowersox' motion for leave to file an interlocutory

appeal. *Id.* at A7-A8. The United States Court of appeals for the Eighth Circuit affirmed the district court's order in an opinion issued October 20, 1998. *See Smith v. Bowersox*, 159 F.3d 345 (8th Cir. 1998), reprinted in Pet. App. A1-A8.

ARGUMENT

This case does not present any difficult, novel or hotly contested issue of law. There is no split among the lower courts presented. To the contrary, although there are numerous lower court decisions in line with the Eighth Circuit's decision in this case, Smith is aware of no court which has adopted respondent Bowersox's constricted and historically inaccurate interpretation of the phrase "conclusion of direct review" to be limited to review by a state court of last resort. Rather, the lower courts have uniformly recognized "direct review" to include certiorari review of state court convictions by this Court. Respondent Bowersox has accordingly failed to identify any basis for this Court to grant a writ of certiorari.

I. THE EIGHTH CIRCUIT'S DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF EVERY OTHER FEDERAL COURT TO CONSIDER THE ISSUE.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") modified 28 U.S.C. § 2244 by establishing a one year period of limitation for filing petitions for a writ of habeas corpus. *See* 28 U.S.C. § 2244(d)(1)(A). The statute of limitations runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Id.

Every court to consider the question has concluded, as did the Eighth Circuit, that, for purposes of Section 2244(d)(1)(A), the "conclusion of direct review" is after this Court has issued its decision on a petition for certiorari or "when the time for filing such a petition expires . . . ." *Gonzalez v. DeTella*, 6 F. Supp. 780. 782 (N.D. Ill. 1998); *see also Cox v. Angelone*, 997 F. Supp. 188, 189 (E.D.Va. 1998) determining same); *Alexander v. Keane*, 991 F. Supp. 329, 334 (S.D.N.Y. 1998) (". . . .the Court rejects the

respondent's argument that the statute of limitations begins to run from the time the Court of Appeals affirmed the conviction without adding the ninety days in which a petition for certiorari could have been filed."); *Flowers v. Hanks*, 941 F.Supp. 765, 770 (N.D.Ind. 1996) (finding that "[s]ince review of a state criminal conviction by the Supreme Court of the United States is considered direct review of the conviction, . . . , the time period in which Flowers could have filed his petition for a writ of certiorari in the Supreme Court of the United States must be considered in calculating the time period in which petitioner could have sought direct review of his conviction for purposes of § 2244(d)(1)"; *Souch v. Harkins*, 21 F. Supp. 2d 1083, 1084 (D. Ariz. 1998) (same); *Moore v. Hawley*, 7 F. Supp. 2d 901, 903 (E.D. Mich. 1998) (same); *Baskin v. United States*, 998 F. Supp. 188, 189 (D. Conn. 1998) (same); *United States ex. rel. v. Dorsey*, 988 F. Supp. 917, 919 (D. Md. 1998)(same).[1]

In light of this unanimity among the lower courts (which Petitioner, tellingly, does not dispute or even acknowledge), there simply is no need for this Court to review the Eighth Circuit's decision.

II. THE EIGHTH CIRCUIT'S DECISION CORRECTLY CONSTRUES THE PHRASE "CONCLUSION OF DIRECT REVIEW."

Certiorari review is also unnecessary because the decision below is plainly correct. The nomenclature "direct review" has routinely and historically been used to refer to certiorari review by this Court of decisions of state courts of last resort. *Bell v. Maryland*, 378 U.S. 226, 232 (1964). For example, "direct review" clearly connotes

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[1] In addition, the Tenth Circuit has found that "direct review" under 28 U.S.C. § 2255 includes review by certiorari. *United States v. Simmonds*, 111 F.3d 737, 744 (10th Cir. 1997).

review by this Court of state court convictions in criminal proceedings, as opposed to "collateral review" of such convictions through federal habeas proceedings under 28 U.S.C. § 2254. *Id.*

In addition, there is also a well-established body of federal case law that interprets the phrase "final by the conclusion of direct review" to include an opportunity to seek certiorari. *See Teague v. Lane*, 489 U.S. 289, 295 (1989); *Caspari v. Bolden*, 510 U.S. 383, 390 (1994). When Congress elects to use terminology that has become commonplace in court decisions, the rules of statutory construction require that a statute's terms be interpreted in harmony with their accepted judicial meaning. *See Evans v. United States*, 504 U.S. 246, 263 (1952). Thus, "a chance to solicit review of constitutional issues before the United States Supreme Court, after the end of the state court proceedings, properly falls within the meaning of "'final by the conclusion of direct review'". *Smith*, 159 F.3d 345, 346 (8th Cir. 1998).

Respondent Bowersox has failed to come forward with any reasons why these many court decisions should be disregarded or why the commonly understood phrase "direct review" should be interpreted any differently in the wake of the AEDPA.

III. THE COURT OF APPEAL'S INTERPRETATION COMPORTS WITH THE CONGRESSIONAL INTENT BEHIND THE AEDPA

Finally, respondent Bowersox argues that the Court of Appeals' interpretation of the statute creates an internal inconsistency in the AEDPA, presumably because § 2263 (which applies in "opt-in" capital states) specifically excludes the time period for a petition for writ of certiorari. To the contrary, this

> reading would contribute to a coherent interpretation of the AEDPA as a whole by harmonizing the key features of the

> filing period sections. To put it another way, courts will hesitate to construe legislation ostensibly meant to streamline federal habeas actually to make it more complex by establishing different accounts of similar legal events.

Larry Yackle and Mark Tushnet, Symbolic Statutes and Real Law: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 Duke L.J. 1, 29 (1997) (concluding that reading direct review so as to include petitioning for writ of certiorari would be the most reasonable interpretation) (citations omitted). Furthermore, the parallel provision in Section 2263

> runs a filing period from 'final state court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.' By negative implication, the more general reference here to the conclusion of "direct review" is not limited to proceedings in state court, but extends as well to proceedings before the Supreme Court of the United States.

Larry W. Yackle, A Primer on the New Habeas Corpus Statute, 44 Buffalo L. Rev. 381, 387 (1996). If congress had wished to end direct review with the date of a state's Supreme Court decision, just as it did in § 2263, it could have done so. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (*per curiam*) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.")[2]

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[2] It is also significant that the opt-in statute of limitations treats the filing of a petition for certiorari "to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the Court of last resort of the state"--but not the time taken to prepare a timely certiorari petition--for tolling the statute. 28 U.S.C. § 2263(b)(1). The fact that the nonopt-in statute of limitations contains no provision for "tolling" during certiorari proceedings while the opt-in *does* contain

CONCLUSION

Because the courts are in wide agreement concerning the interpretation of this statutory provision and there is consistent, rapidly well-developing body of case law regarding the triggering of Section 2254 limitation's period, review by certiorari is not warranted.

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT

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such a tolling provision, supports the conclusion that the nonopt-in limitations period is not intended to begin running until after (and thus could sensibly not be tolled by) certiorari proceedings. This is because the opt-in limitations period, including when the opt-in tolling provisions are considered, is designed to be substantially shorter than the nonopt-in limitations period. *See* James S. Liebman and Randy Hertz, Federal Habeas Corpus Practice and Procedure, 2d Ed., (1997 Supp.), pgs 100-104.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 2nd day of February, 1999, to:

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February 2, 1999

William Suter
Office of the Clerk
Supreme Court of the United States
Washington D.C. 20543

Re: Michael Bowersox v. Keith A. Smith
Case No. 98-1127

Dear Mr. Suter:

Enclosed for filing in the above-referenced matter please find Respondent's Motion for Leave to Proceed *In Forma Pauperis* as well as the original and eleven copies of Respondent's Opposition to Petition for Writ of Certiorari.

Thank you for your kind attention to this matter.

Very truly yours,

LATHROP & GAGE L.C.

By: William C. Odle
William C. Odle

WCO:mlh
Enclosures

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No. 98-1127

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MICHAEL BOWERSOX,
Superintendent, Potosi Correctional Center,

Petitioner,

vs.

KEITH A. SMITH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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28 U.S.C. §2261. 2

Why This Case Presents An Important Question Of Federal Law That Has Not, But Should Be, Settled By This Court

Respondent contends that this issue should not be reviewed because there is not split in the Circuits on this issue. Petitioner never asserted that there was a split, in fact petitioner is not aware of any other Circuit Court that has decided this issue.

Moreover, while respondent alleges numerous lower court opinions have sided with the Eighth Circuit Court of Appeals on this issue, respondent relies on opinions from District Courts. Respondent cites to no Circuit Court opinion that has held the one year statute of limitation period begins once this Court declines discretionary review instead of beginning at the conclusion of direct review by the state courts.

Respondent's citation to District Court opinions that have held §2244(d)(1)(A) provides an opportunity to file a petition for writ of certiorari demonstrates why this is an important question of federal law that has not, but should be, settled by this Court. If the District Courts continue to reject the position advanced in the present petition and denies a petition for writ of habeas corpus on the merits, the present issue will never be decided by this Court. Only when a District Court rejects the position advanced in the present petition and grants the petition for writ of habeas corpus, or as in the present case were an interlocutory appeal has been taken, will this issue ever be ripe for review.

As discussed in petitioner's petition, if this Court declines to review this issue at the present time, but were to later agree with petitioner's position in a future case, inmates relying on the Court of Appeals decision, or the District Court decisions listed by respondent, will have their petitions dismissed as untimely. This is a significant issue given that the lower courts have declined to find that any state has met the opt-in provisions of 28 U.S.C. §2261.

Why Past Interpretation Of The Term "Direct Review" Does Not Control

Respondent contends that this Court's past interpretation of "direct review" controls how the term "direct review" in §2244(d)(1)(A) should be interpreted.

Simply because this Court in ***Bell v. Maryland***, 378 U.S. 226 (1964) held that direct review includes certiorari review does not mean that the term "direct review" in §2244(d)(1)(A) also includes the petition for writ of certiorari. Like this Court's holding in ***Teague v. Lane***, 489 U.S. 289 (1989) and ***Caspari v. Bohlen***, 510 U.S. 383 (1994), this Court in ***Bell*** was deciding the issue of finality for retroactivity. ***Id.*** 378 U.S. at 232. Therefore, relying on cases that have held that "direct review", for the purpose of finality, includes the opportunity to file a petition for writ of certiorari under §2244(d)(1)(A) was erroneous.

Why Congress Did Not Intend The Term "Direct Review" To Include The Opportunity To File A Petition For Writ Of Certiorari

Respondent contends that the Court of Appeals interpretation "comports" with the congressional intent behind the Antiterrorism and Effective Death Penalty Act of 1996.

In support of this position respondent refers to a law review article that opines that including the opportunity to file a petition for writ of habeas corpus as part of the "direct review" of §2244(d)(1)(A) is a "reasonable interpretation." However, simply because a scholar believes one "reasonable interpretation" of the statute includes the opportunity to file a petition for writ of certiorari does not end this analysis.

The Court of Appeals did not conduct a statutory interpretation of §2244(d)(1)(A) and respondent may not substitute a law review article in its absence. Because the Court of Appeals did not conduct a statutory interpretation of §2244(d)(1)(A), this Court should grant certiorari in order to resolve this significant issue that has not been addressed by this Court, but should be in this case.

CONCLUSION

Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and reverse the judgment of that court.

Respectfully submitted,

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